

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Thomas C. Johnson,

Petitioner,

FINDINGS OF FACT,  
CONCLUSIONS-AND  
RECOMMENDATION

V.

Duluth Airport Authority,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick at 9:30 a.m. on May 9, 1990, in the Federal Building Civic Center, Room 238, 515 West First Street, Duluth, Minnesota. The Petitioner, Thomas C. Johnson, 1502 Winter Street, Superior, Wisconsin 54880, appeared pro se. Robert E. Asleson, Assistant City Attorney, Room 400, City Hall, Duluth, Minnesota 55802, appeared on behalf of the Respondent, Duluth Airport Authority. Petitioner; Joseph Johnson, Petitioner's son; John C. Grinden, Respondent's Executive Director; and Will Mattson, Business Representative of AFSCME Council 96 for AFSCME Local 66, testified at the hearing. The record was closed upon adjournment of the hearing on May 9, 1990.

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner of Veterans Affairs shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Commissioner William J. Gregg, Department of Veterans Affairs, 2nd Floor, Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Whether Petitioner voluntarily quit or was terminated from his position with Respondent.
2. Whether, if Petitioner was terminated, Respondent gave him proper notice of his veterans preference rights.

Based upon the record herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. Petitioner served on active duty in the United States Air Force from March 29, 1966, to February 12, 1970, and received an Honorable Discharge.

2. Petitioner worked for Respondent for nine or ten years as a heavy equipment mechanic until March 1989.

3. Petitioner's wife is from the Philippines and was in the Philippines for some period of time prior to March 1989. While there, it is alleged that she, operating under an alias, passed several bad checks on U.S. military bases totalling several thousand dollars and also \$1,200 worth of bad checks to a Philippine national. She was the subject of criminal investigations by the Philippine government and the Air Force Office of Special Investigations.

4. During early 1989, Petitioner's wife called him very often while he was working. Petitioner's foreman instructed Petitioner that the calls would no longer be allowed because they were interfering with his ability to work. Petitioner's wife then called John Grinden, Respondent's Executive Director, to complain about the telephone calls being cut off.

5. During early March 1989, Petitioner had told Grinden that his wife was having difficulty in the Philippines in getting back to the United States. Petitioner mentioned that he had sought the assistance of Congressman Oberstar's office in dealing with the Philippine authorities.

6. On March 18, 1989, a Saturday, Petitioner tried to reach Grinden at his home. About 5:30 p.m., Grinden arrived home and returned Petitioner's call. Petitioner told Grinden that he had an opportunity to go to the Philippines to help his wife return home, that he thought he could have her back within a week and that he could do it on his remaining vacation time. That vacation time would have been used up as of March 29, 1989. Petitioner also requested an indefinite leave of absence without pay. Grinden did not authorize the leave and informed Petitioner that he would have to be back when his vacation was used up.

7. On March 19, 1989, Petitioner left for the Philippines. On March 26, 1989, he arrived at Clark Air Base where his wife had been living since March 9, 1989, in Distinguished Visitors Quarters in a building known as Chambers Hall. Petitioner's wife had been allowed to stay in the quarters at the request of an aide to Congressman Oberstar. When Petitioner arrived, he was "billeted with his wife in Room 115."

8. Petitioner lived at 1528 Grand Avenue, Superior, Wisconsin 54880, on March 19, 1989, when he left for the Philippines. His eighteen year old son and sixteen year old daughter remained at home alone. About a month later, they moved in with the Wicklunds, who were family friends. Within a week of moving to the Wicklunds, Petitioner's son changed the forwarding address of the family to the Wicklunds' address.

9. On March 29, 1989, Grinden wrote to Petitioner at 1528 Grand Avenue, Superior, Wisconsin 54880, the only official address Respondent had for Petitioner. A copy of the letter was sent to Will Mattson, the Union Representative. The letter informed Petitioner that as of March 30, 1989, he would have used up all of his accrued vacation and that no time off over and above accrued vacation had been authorized for him to go to the Philippines to provide assistance to his wife. The letter stated that if he failed to report to work on March 30, 1989, he would be deemed in violation of the Labor Agreement between Respondent and AFSCME Local 66 and removed from the payroll as of that date.

10. On March 31, 1989, Petitioner called Respondent's office and talked with one of the secretaries. Although he was told that Grinden was in the building, Petitioner did not want to talk to him. He asked that his son be allowed to pick up his paycheck.

11. On April 14, 1989, Grinden wrote another letter to Petitioner, again addressed to 1528 Grand Avenue, Superior Wisconsin 54880, with a copy to Mattson. The letter noted that Petitioner had been absent from work without leave for more than two weeks and that he had been authorized to use his vacation but not granted any permission to be absent beyond that time. The letter went on to state:

Despite having used up all your vacation, you failed to directly contact me or your immediate supervisor to make arrangements for unpaid leave or any other authorization for not reporting to work as you were obligated to do. As of this date I have no idea when, if ever, you intend to report for work and begin fulfilling your job obligations.

The letter went on to state that if Petitioner failed to report for work on Monday, April 17, 1989, Grinden would be compelled to commence the termination process.

12. On April 17, 1989, Petitioner called Grinden and told him that they were having more problems with his wife's passport. Prior to that time, Grinden had received several calls from Barry Wickland saying that he had talked to Petitioner a number of times and had been asked to keep Grinden informed. That information was usually that Petitioner's wife would be obtaining her passport within a few days. Thus, when Petitioner called, Grinden was quite skeptical of what Petitioner was telling him. Petitioner again asked if he could have a leave of absence without pay until he was able to return. Grinden told him that he had originally only authorized the use of the vacation time, not additional leave without pay and that that would not change. Grinden did not tell Petitioner that his job was in jeopardy, but told him to return to work as soon as possible and to keep him informed. Petitioner told Grinden that making phone calls was difficult and Grinden told him to write him a letter if necessary telling him when he would be able to return to work.

13. On May 2, 1989, Grinden sent Petitioner a letter addressed to Petitioner at Chambers Hall, Room 115, Clark Air Force Base, the Philippines. That letter stated that Petitioner had been absent for over six weeks and had

failed to keep Grinden informed as to when he might expect him to return to work. The letter also informed Petitioner that the request he made in the April 17, 1989 telephone call for unpaid leave for an unspecified period was denied, and that if he did not return for work on May 10, 1989, he would be terminated. It stated that if he did return to work by that time, Grinden would be willing to consider any justification to persuade him that his continued employment was in the best interest of Respondent. A copy of the letter was sent to Mattson.

14. On April 26, 1989, the Air Force had billed the Petitioner and his wife \$1,149.00 for the lodging and for the inventory of beer, liquor and snacks that had to be restocked in Petitioner's room on a daily basis. The Air Force also stopped stocking the room. On May 10, 1989, Petitioner asked the sergeant in charge of the transient quarters why his room was not being stocked and was told that it would not be stocked until the outstanding bill had been paid. Petitioner informed the sergeant that they would receive a letter from Congressman Oberstar's office with instructions on where to send the bill. Petitioner gave the sergeant the telephone number of the Congressman's aide. Another sergeant called the aide and was told that the Congressman's office would not pay the bill and that Petitioner was responsible for it. On May 11, the Air Force decided to evict Petitioner and his wife. When Petitioner was told of the decision, he said he would call the Congressman's office, which he did with someone from the Air Force present. Again, the Congressman's aide told Petitioner that the Congressman's office would not pay the bill and that he would be responsible for it. On May 12, 1989, Petitioner and his wife were evicted from Chambers Hall. Subsequently, they were barred from entering Clark Air Base and all other U.S. military installations in the Philippines.

15. On May 11, 1989, Grinden sent Petitioner another letter, addressed both to 1528 Grand Avenue, Superior, Wisconsin 54880, and to Chambers Hall, Room 115, Clark Air Force Base, the Philippines. The letter was a notice of termination and stated:

The Authority is hereby notifying you of its intention to terminate your employment as soon as it is legally permitted to pursuant to law and the Collective Bargaining Agreement between the Duluth Airport Authority and Local 66 A.F.S.C.M.E.

As you are already on an unpaid suspension for failure to report to work you will continue on that status pending termination unless and until you report for work or the termination process is completed.

As an honorably discharged, qualified veteran of the United States Armed Forces you have the right to a Hearing regarding your removal for cause. If you wish to have such a Hearing you must deliver a written Demand for

Hearing to John C. Grinden, Executive Director at his office in the Duluth International Airport, Passenger Terminal Building within 60 days of May 11, 1989.

If you report for work and demand such a Hearing you will be paid during the period of suspension preceeding the Hearing and resolution of the issues.

You also have the right pursuant to the above Collective Bargaining Agreement to file a grievance regarding your suspension and removal from employment.

if you do so you will be deemed to be "suspended" until the grievance is resolved.

The reason for your removal for cause from Airport Authority employment is:

1. Your failure to report to work since March 29, 1989 and to date without consent, permission, or leave from your employer.
2. Your failure to justify and request consent and,
3. Your failure to inform your employer as to when you would report for work.

A copy of the letter was also sent to Mattson.

16. Respondent had previously been involved in a veterans preference matter with Petitioner and Grinden had determined to proceed cautiously in this matter in an attempt to ensure they did not violate any of Petitioner's veterans preference rights.

17. On May 17, 1989, Mattson wrote to Petitioner at both the 1528 Grand Avenue and Chambers Hall addresses expressing his concern over Petitioner's employment status and offering to assist Petitioner.

18. When Petitioner's and his wife left Clark Air Base on May 12, 1989, they lived with various friends and relatives in the Philippines. The Petitioner left no forwarding address at Clark Air Base and never received any of the letters that were sent to him at Chambers Hall. The May 2, 1989 letter was signed for at Clark Air Base by a Thomas A. Johnson on July 7, 1989. That Thomas Johnson is not Petitioner. The May 11 letter from Grinden and the May 17 letter from Mattson were returned to the senders with the envelopes marked to indicate that Petitioner had "checked out" on May 12, 1989. The letter returned to Mattson had been opened by someone at the air base who included a note reciting some of the matters described above in Finding 14.

19. Petitioner's son did receive the May 17, 1989, letter from Mattson and the May 11, 1989 letter from Grinden. Shortly after receiving them, he had a brief telephone discussion with his father and told him that there was a problem with his job. Petitioner told his son that he did not have time to deal with that at the time and that it would have to wait until he got back.

20. On July 27, 1989, Grinden wrote Johnson at the 1528 Grand Avenue, Superior, Wisconsin, address informing him that he was considered to have resigned as of July 14, 1989. That date was selected so as to preserve his veterans preference rights for sixty days from the May 11, 1989 notice. The determination that he had resigned was based upon the fact that he was only authorized to be absent from work until March 29, 1989, that he had not

reported to work or advised Respondent of his expected date of return to work and that, by his own actions, he had resigned according to Article 35.3 of the

Labor Agreement between Respondent and AFSCME Local 66. Copies of the letter were sent to Mattson and also to Barry Wicklund and to E. W. Riska, Petitioner's grandmother. Petitioner's grandmother had, at some previous times, contacted Respondent regarding Petitioner.

21. Article 35.3 of the Labor Agreement between Respondent and AFSCME Local 66 provides as follows:

Any employee who is absent from duty for three (3) consecutive business days without securing leave from his/hpr supervisor or without notifying him/her of the reason for his/her absence and the time when he/she expects to return, or who fails to notify the Executive Director of his/her readiness to resume his/her duties within five (5) days after the expiration of a leave of absence, shall be considered to have resigned, and such resignation shall be treated as a resignation without notice and a report thereof made to the Executive Director.

22. Petitioner was finally able to make arrangements to return to the United States and arrived here on October 27, 1989. His son gave him the May 17, 1989 letter from Mattson. Petitioner tried to contact Mattson on Monday, October 30, 1989, and finally was able to see him on Thursday, November 2, 1989. At that time, Mattson showed him the copies of all the letters he had received from Respondent. Petitioner then went to see Mr. Grinden and was told that he no longer had a job. Petitioner filed a grievance with Local 66, which the union eventually elected not to pursue. On November 9, 1989, Petitioner filed his petition to the Commissioner of Veterans Affairs at the Duluth office of the Department of Veterans Affairs. The Notice of Petition and Order for Hearing was served upon Respondent on February 28, 1990.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. 14.50 and 197.481. The Petition was duly filed. The Notice of Hearing issued by the Department of Veterans Affairs was proper and all substantive and procedural requirements have been fulfilled.

2. Petitioner is a veteran as required by Minn. Stat. 197.46.

3. As the party initiating this contested case, the Petitioner has the burden of proving the facts at issue by a preponderance of the evidence. Minn. Rule 1400.7300, Subp. 5.

4. Petitioner failed to appear for work with Respondent without leave or approval of Respondent from and after March 30, 1989. No official of Respondent had granted Petitioner permission to be absent after March 29, 1989.



5. Petitioner failed to contact Respondent at any time after April 17, 1989, in any manner until November 2, 1989. Petitioner's actions of not reporting for work as required by Respondent, while due to difficulties he and his wife experienced in the Philippines, were the result of a conscious choice by Respondent to not report to work.

6. The failure of Petitioner to report to work on and after March 30, 1989, was an abandonment of the job by Petitioner and a voluntary termination of his employment by Petitioner is equivalent to a resignation and properly considered as a resignation without notice under the Labor Agreement between Respondent and AFSCME Local 56.

7. Because Petitioner voluntarily quit his employment with Respondent, Respondent's refusal to allow him to return to work on November 2, 1989, was not a removal of Petitioner from his position as contemplated by Minn. Stat. 197.46.

8. To the extent Respondent's refusal to allow Petitioner to return to work is considered a removal under Minn. Stat. 197.46, the notice provided to Petitioner at his last known address by Respondent on May 11, 1989, complied with the notice requirements of Minn. Stat. 197.46.

9. Service of the notice of termination and right to a hearing dated May 11, 1989, by mailing the notice to Petitioner's last known address with copies to persons known to have been in contact with Petitioner previously, together with the fact that Petitioner was advised by his son of the contents of the letter, constitutes "receipt" of the notice by Petitioner.

10. Petitioner's failure to request a hearing on the notice of termination within sixty days, coupled with his decision to not address the matter until his return to the United States, constitutes a waiver of his right to a hearing under Minn. Stat. 197.46.

11. Respondent has not denied Petitioner any rights provided to him under Minn. Stat. 197.46 with regard to its refusal to allow him to return to work on November 2, 1989.

12. The Petition should be denied.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs order that the Petition of Thomas C. Johnson be denied.

Dated this        day of June, 1990.

STEVE M. MIHALCHICK  
Administrative Law Judge



#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped, not transcribed. Tape Nos. 8768 and 8843.

#### MEMORANDUM

Petitioner's testimony about his reasons for being in the Philippines, the nature of his wife's problems and what occurred there was not believable because it was directly refuted by the Air Force reports that he claimed he knew nothing about. His testimony that he was not aware of some of the letters sent to his house by Respondent is also suspect because he seemed to have telephone conversations with his son, Barry Wicklund, his grandmother, Congressman Oberstar's office and Respondent's office whenever he wanted, at least until he was barred from the military installations. Likewise, Grinden's version of his discussions with Petitioner is far more credible than Petitioner's.

The essential facts are that Petitioner was absent from his job without any sort of leave or approval of his employer from March 30, 1989, to November 2, 1989. He asked to be put on unpaid leave, but that request was refused. A more benevolent employer might have allowed the leave status, but nothing requires that, particularly nothing in Minn. Stat. 197.46 of the Veterans Preference Act.

When Petitioner did not show up for work as required, at some point his failure to appear became a voluntary quit. Under the Labor Agreement, that occurred either three or five days after he failed to return to work, depending on which provision of Article 35.3 is read to apply to the situation. An employee who refuses to serve or voluntarily abandons his employer's service, terminates the employment, or, at least, the employer is authorized to rescind the contract and refuse to be bound by it. 56 C.J.S., Master and Servant 40 at 424. Petitioner's employment required that he work. When he refused to do that, through no fault attributable to Respondent, he abandoned his job. Respondent did not remove him from the position, he removed himself.

Although it was not required, in an exercise of caution an attempt to comply with the veterans preference rights provided to Petitioner under Minn. Stat. 197.46, Respondent did provide notice to Petitioner after he had not been at work for six weeks that he was being terminated. It also provided notice that under the Veterans Preference Act he had sixty days to request a hearing. The notice given substantially complies with the requirements of Minn. Stat. 197.46. Under that statute, the veteran has a right to request a hearing within sixty days of receipt of the notice of intent to discharge. The notice stated that the request must be delivered within sixty days of the

date of the letter. While that varies somewhat from the specific language of

the statute, the intent of the Respondent was to allow him all the rights provided by the statute and Respondent did, in fact, wait until July 14, 1989, to make the termination effective. Moreover, Petitioner was aware of the notice and made the deliberate choice to do nothing about it and wait until he was able to return to the United States.

It is clear that Petitioner himself did not receive a copy of the notice of intent to terminate until November 2, 1989. But the inability of Respondent to serve the notice upon him was of Petitioner's doing. Respondent did everything it could to get notice to Petitioner; it sent the notice to his still-official home address and to persons the Respondent knew had had contact with Petitioner. Petitioner never asked Respondent to change his official address and never provided forwarding address. Petitioner was made aware of the notice by his son. Thus, Petitioner cannot be allowed to claim that he was denied any rights because he did not receive the notice. It must be concluded that Petitioner in effect received the notice in mid-May 1989 for purposes of triggering the sixty-day time limit to request a hearing. He deliberately chose not to do anything about the notice until he returned to the states, which was far more than 60 days later. Moreover, on November 2, 1989, Petitioner actually received a copy of the written notice and did not, within 60 days, make a request to Respondent for a veterans preference hearing.

Petitioner's difficulties in the Philippines were very unfortunate. However, nothing in the Veterans Preference Act gives a veteran a right to abandon his job and then demand to be reinstated.

SMM